First, the program carriage rules merely prohibit a cable operator from requiring a financial interest in a video programming vendor as a condition for carriage, from coercing a video programming vendor to provide exclusivity as a condition of carriage, or from discriminating on the basis of affiliation that unreasonably restrains the ability of unaffiliated video programming vendors to compete fairly.[142] The program carriage provision of the Act, as well as our rules implementing that provision, do not compel a cable operator to carry certain programming, nor do they specify the rates for carriage. Second, the rules, which have been in force since 1993 and were required by Congress in 1992, do not interfere with any current investment-backed expectations.[143] Third, the rules substantially advance the legitimate governmental interest in promoting competition and diversity in the video programming market, an interest that Congress has directed the Commission to vindicate and that the courts have recognized as important.[144] Finally, our examination of the record in this proceeding refutes the premise of TWC's argument that the program carriage rules serve no purpose in light of the current state of competition in the video programming market.[145] Thus, the rules do not effect a "taking" within the meaning of the Fifth Amendment.

F. Adequate Notice

36. We reject arguments that the *Program Carriage NPRM* failed to provide the specificity required under the Administrative Procedure Act ("APA") and that the Commission must issue another notice before adopting final rules.[146] Sections 553(b) and (c) of the APA require agencies to give public notice of a proposed rule making that includes "either the terms or substance of the proposed rule or a description of the subjects and issues involved" and to give interested parties an opportunity to submit comments on the proposal.[147] Such notice is not, however, required for rules involving agency procedure.[148] The standstill procedures and the revised procedural rules adopted herein, including extending the deadline for a defendant to file an answer to a complaint, are rules of agency procedure for

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(...continued from previous page)
relied instead on ad hoc, factual inquiries into the circumstances of each particular case. To aid in this determination, however, we have identified three factors which have particular significance: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.") (citations and internal quotes omitted), quoted in *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments,* Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20262, ¶ 56 (2007) ("*MDU Exclusives Order*"), *aff'd sub nom. Nat'l Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[142] *See MDU Exclusives Order*, 22 FCC Rcd at 20262, ¶ 57.

[143] *See id.* at 20263, ¶ 58 (declining to find interference with investment-backed expectations where exclusivity clauses in MDU contracts had been under regulatory scrutiny for over a decade, and Commission had prohibited enforcement of such clauses in similar contexts).

[144] *See* 47 U.S.C. § 536; *Time Warner Entertainment Co., L.P.*, 93 F.3d at 969; *see also MDU Exclusives Order*, 22 FCC Rcd at 20263, ¶ 59.

[145] *See supra* ¶ 33.

[146] *See* Comcast Comments at 14 n.34; Comcast Reply at 39-41; *see also* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (May 17, 2011); Letter from Howard J. Symons, Counsel for Cablevision, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (June 1, 2011).

[147] *See* 5 U.S.C. § 553(b), (c).

[148] *See* 5 U.S.C. § 553(b)(A).

which no notice is required under the APA.[149] When notice is required under the APA, the notice "need not specify every precise proposal which [the agency] may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved."[150] In particular, the APA's notice requirements are satisfied where the final rule is a "logical outgrowth" of the actions proposed.[151] Here, the *Program Carriage NPRM* specifically sought comment on, among other questions, "whether the elements of a *prima facie* case should be clarified,"[152] "whether specific time limits on the Commission, cable operators, or others would promote a speedy and just resolution" of program carriage disputes,[153] and "whether the Commission should adopt rules to address the complaint process itself."[154] But in any event, with respect to the standstill procedures, the Commission specifically sought comment on whether to "adopt additional rules to protect programmers from potential retaliation if they file a complaint."[155] As discussed above, the standstill procedure will help to prevent retaliation while a program carriage complaint is pending, and thus is a "logical outgrowth" of this proposal.[156]

IV. NOTICE OF PROPOSED RULEMAKING

37. In this *NPRM* in MB Docket No. 11-131, we seek comment on the following additional revisions or clarifications to both our procedural and substantive program carriage rules, which are

[149] *See id.* While Comcast claims that the procedures we adopt herein for a program carriage standstill will have "substantive effects," the fact is that these procedures codify the process for requesting a standstill that a complainant could request, and the Commission or Media Bureau could issue, today without the new procedures adopted herein. *See* Comcast July 25 2011 *Ex Parte* Letter at 7; *supra* n.118. Any "substantive effects" resulting from the filing and consideration of a program carriage standstill request exist today and are not affected by the procedures we adopt herein. *See JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (Commission's "hard look" rules were procedural because they "did not change the substantive standards by which the Commission evaluates license applications"); *Bachow Commc'ns, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) (Commission cut-off date for certain amendments to pending applications was procedural); *Neighborhood TV Co. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984) (Commission interim processing rules were procedural); *Kessler v. FCC*, 326 F.2d 673 (1963) (same); *Ranger v. FCC*, 294 F.2d 240, 243-44 (D.C. Cir. 1961) (Commission cut-off date for filing applications was procedural). The procedures we adopt herein do not alter the existence or scope of any substantive rights, but simply codify a pre-existing procedure for obtaining equitable relief to vindicate those rights. Any alleged burden stemming from a procedural rule is not sufficient to convert the rule into a substantive one that requires notice and comment. *See, e.g., James V. Hurson Assocs, Inc. v. Glickman*, 229 F.3d 277, 281 (D.C. Cir. 2000) ("even if the [agency's] elimination of [the procedural rule] did impose a substantial burden . . . , that burden would not convert the rule into a substantive one that triggers the APA's notice-and-comment requirement.... [A]n otherwise-procedural rule does not become a substantive one, for notice-and-comment purposes, simply because it imposes a burden on regulated parties.").

[150] *See Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (internal quotations omitted).

[151] *See Public Service Commission of the District of Columbia v. FCC*, 906 F.2d 713, 717 (D.C. Cir. 1990).

[152] *Program Carriage NPRM*, 22 FCC Rcd at 11227, ¶ 14.

[153] *Id.* at 11227, ¶ 15.

[154] *Id.* at 11227, ¶ 16.

[155] *Id.*

[156] *See supra* ¶ 25. The fact that the Commission may have been more explicit in seeking comment on a standstill process in other contexts does not undermine the fact that the program carriage standstill procedures are rules of agency procedure for which no notice is required under the APA and, in any event, are a logical outgrowth of the request for comment on rules to protect programmers from retaliation. *See* Comcast July 25 2011 *Ex Parte* Letter at 7 (citing *Retransmission Consent NPRM*, 26 FCC Rcd at 2727-29, ¶¶ 18-19 and *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Notice of Proposed Rulemaking, 22 FCC Rcd 17791, 17868-70, ¶¶ 136-138 (2007)).

intended to facilitate the resolution of program carriage claims.[157] We also invite commenters to suggest any other changes to our program carriage rules that would improve our procedures and promote the goals of the program carriage statute.

A. Statute of Limitations

38. The current program carriage statute of limitations set forth in Section 76.1302(f) provides that a complaint must be filed "within one year of the date on which one of the following events occurs:

> (1) The multichannel video programming distributor enters into a contract with a video programming distributor that a party alleges to violate one or more of the rules contained in this section; or
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> (2) The multichannel video programming distributor offers to carry the video programming vendor's programming pursuant to terms that a party alleges to violate one or more of the rules contained in this section, and such offer to carry programming is unrelated to any existing contract between the complainant and the multichannel video programming distributor; or
>
> (3) A party has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on violations of one or more of the rules contained in this section."[158]

Our concern is with Section 76.1302(f)(3), which states that a complaint is timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file a complaint and contains no reference to when the alleged violation of the program carriage rules occurred.[159] In other words, the rule could be read to provide that, even if the act alleged to have violated the program carriage rules occurred many years before the filing of the complaint, the complaint is nonetheless timely if filed within one year of when the complainant notified the defendant MVPD of its intention to file. Moreover, the introductory language to 76.1302(f) provides that a complaint must be filed "within one year of the date on which one of the following events occurs,"[160] which implies that a complaint filed in compliance with Section 76.1302(f)(3) is timely even if it would be untimely under Sections 76.1302(f)(1) or (f)(2). Thus, it

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[157] Unless otherwise noted, all references to comments, reply comments, or letters in this *NPRM* refer to submissions filed in response to the *Program Carriage NPRM* in MB Docket No. 07-42. *See Program Carriage NPRM,* MB Docket No. 07-42, 22 FCC Rcd 11222 (2007).

[158] 47 C.F.R. § 76.1302(f). This rule will now appear at Section 76.1302(h) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07-42 take effect. *See infra*, Appendix B.

[159] As originally adopted in the *1993 Program Carriage Order*, the rule that is now Section 76.1302(f)(3) formerly read that a complaint must be filed within one year of the date when "the complainant has notified a multichannel video programming distributor that it intends to file a complaint with the Commission based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged, allegedly in violation of one or more of the rules contained in this subpart." *See 1993 Program Carriage Order*, 9 FCC Rcd at 2652-53, ¶ 25 and 2676, Appendix D (47 C.F.R. § 76.1302(r)(3)). In the *1994 Program Carriage Order*, the Commission eliminated without explanation the language in this rule specifying that the complainant's notice of intent would be "based on a request for carriage or to negotiate for carriage of its programming on defendant's distribution system that has been denied or unacknowledged." The Commission replaced the rule with the current language, with a minor edit adopted in the *1998 Biennial Regulatory Review Order. See 1994 Program Carriage Order*, 9 FCC Rcd at 4421, Appendix A (47 C.F.R. § 76.1302(r)(3)); *1998 Biennial Regulatory Review Order*, 14 FCC Rcd at 441, Appendix A (changing the word "subpart" to "section").

[160] 47 C.F.R. § 76.1302(f).

appears that Section 76.1302(f)(3) undermines the fundamental purpose of a statute of limitations "to protect a potential defendant against stale and vexatious claims by ending the possibility of litigation after a reasonable period of time has elapsed."[161]

39. In light of these concerns, we propose to revise our program carriage statute of limitations to provide that a complaint must be filed within one year of the act that allegedly violated the program carriage rules. We seek comment on any potential ramifications of this revised statute of limitations on programming vendors and MVPDs. We recognize that the issue of when the act that allegedly violated the rules occurred is fact-specific and in some cases may be subject to differing views between the parties. For example, to the extent that the claim involves denial of carriage, an issue might arise as to whether the denial occurred when the MVPD first rejected a programming vendor's request for carriage early in the negotiation process or whether the denial occurred later after further carriage discussions. We expect that the adjudicator will be able to resolve such issues on a case-by-case basis. We believe our proposed rule revision will ensure that program carriage complaints are filed on a timely basis and will provide certainty to both MVPDs and prospective complainants. We propose that this revised statute of limitations will replace Section 76.1302(f) in its entirety, thereby providing for one broad rule covering all program carriage claims. Alternatively, we could replace only Section 76.1302(f)(3) with this revised statute of limitations and retain Sections 76.1302(f)(1) and (f)(2). Because this revised statute of limitations would appear to cover the claims referred to in Sections 76.1302(f)(1) and (f)(2), however, replacing Section 76.1302(f) in its entirety appears to be warranted. We ask parties to comment on this issue.

40. To the extent we retain Section 76.1302(f)(1), we propose to make a minor clarification. As amended in the *1998 Biennial Regulatory Review Order*, the rule currently provides that a complaint must be filed within one year of the date when a "multichannel video programming distributor enters into a contract with a video programming *distributor*" that a party alleges to violate one or more of the program carriage rules.[162] The program carriage statute and rules, however, pertain to contracts, and negotiations related thereto, between MVPDs and video programming *vendors*, not distributors.[163] Indeed, Section 616 of the Act refers to "video programming *vendors*."[164] Consistent with the statute, the previous version of this rule adopted in the *1994 Program Carriage Order* accurately stated that the contract must be entered into with a "video programming *vendor*," not a "distributor."[165] Accordingly, to the extent we retain Section 76.1302(f)(1), we propose to replace the term "video programming distributor" with "video programming vendor."

B. Discovery

41. We seek comment on whether to revise our discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery. As discussed above, if the Media Bureau finds that the complainant has established a *prima facie* case but determines that it cannot resolve the complaint based on the existing record, the Media Bureau may outline procedures for discovery before proceeding to rule on the merits of the complaint or it may refer

[161] *See Bunker Ramo Corp.*, Memorandum Opinion and Order, 31 FCC 2d 449, ¶ 12 (Review Board 1971).

[162] *See* 47 C.F.R. § 76.1302(f)(1) (emphasis added); *see also 1998 Biennial Regulatory Review Order*, 14 FCC Rcd at 441, Appendix A.

[163] *See* 47 U.S.C. § 536; 47 C.F.R. § 76.1301.

[164] *See* 47 U.S.C. § 536 (emphasis added).

[165] *See 1994 Program Carriage Order*, 9 FCC Rcd at 4421, Appendix A (47 C.F.R. § 76.1302(r)(1) (emphasis added)).

the proceeding or discrete issues raised in the proceeding for an adjudicatory hearing before an ALJ.[166] To the extent the Media Bureau proceeds to develop discovery procedures, the *1993 Program Carriage Order* provides that "[w]herever possible, to avoid discovery disputes and arguments pertaining to relevance, the staff will itself conduct discovery by issuing appropriate letters of inquiry or requiring that specific documents be produced."[167] We seek comment on revising the Media Bureau's discovery process for program carriage complaints based on the following: (i) expanded discovery procedures (also known as party-to-party discovery) similar to the procedures that exist for program access complaints; and (ii) an automatic document production process that is narrowly tailored to program carriage complaints. This discovery process would be in addition to the Media Bureau's ability to order discovery under Section 76.7(f).[168] We also seek comment on any other approaches to discovery. Our goal is to establish a discovery process that ensures the expeditious resolution of complaints while also ensuring fairness to all parties.

1. Expanded Discovery Procedures

42. We seek comment on whether to adopt expanded discovery procedures for program carriage complaint proceedings in which the Media Bureau rules on the merits of the complaint after discovery similar to the procedures that exist for program access cases. Under the current program carriage rules, discovery is Commission-controlled, meaning that Media Bureau staff identifies the matters for which discovery is needed and then issues letters of inquiry to the parties on those matters or requires the parties to produce specific documents related to those matters.[169] Under the expanded discovery procedures applicable to program access cases, however, discovery is controlled by the parties. As an initial matter, the program access rules provide that, to the extent the defendant expressly references and relies upon a document in asserting a defense or responding to a material allegation, the document must be included as part of the answer.[170] In addition, parties to a program access complaint may serve requests for discovery directly on opposing parties rather than relying on the Media Bureau staff to seek discovery through letters of inquiry or document requests.[171] The respondent may object to any request for documents that are not in its control or relevant to the dispute.[172] The obligation to produce the disputed material is suspended until the Commission rules on the objection.[173] Any party who fails to timely provide discovery requested by the opposing party to which it has not raised an objection, or who fails to respond to a Commission order for discovery material, may be deemed in default and an order may be entered in accordance with the allegations contained in the complaint, or the

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[166] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21; *see also* 47 C.F.R. § 76.7(f); *1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶¶ 31-33.

[167] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id.* at 2652, ¶ 23 (providing that discovery will "not necessarily be permitted as a matter of right in all cases, but only as needed on a case-by-case basis, as determined by the staff"); *see also* 47 C.F.R. § 76.7(f).

[168] *See* 47 C.F.R. § 76.7(f).

[169] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id.* at 2652, ¶ 23.

[170] *See* 47 C.F.R. § 76.1003(e)(1); *2007 Program Access Order*, 22 FCC Rcd at 17851-52, ¶ 96.

[171] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852, ¶ 98.

[172] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852, ¶ 98. We note that a Petition for Reconsideration of the *2007 Program Access Order* is pending that argues that our rules should clarify that a party is able to object based on privilege in addition to objecting on the grounds of lack of control or relevance. *See* Fox Entertainment Group, Inc., Petition for Reconsideration, MB Docket No. 07-29 (Nov. 5, 2007), at 10.

[173] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852, ¶ 98.

complaint may be dismissed with prejudice.[174] We seek comment on whether these are appropriate discovery procedures for program carriage complaints decided on by the Media Bureau after discovery. Is there any basis to believe that expanded discovery procedures are appropriate for program access cases but not program carriage cases? Will expanded discovery procedures hinder the Media Bureau's ability to comply with the expedited deadline adopted in the *Second Report and Order* for the resolution of program carriage complaints?[175] Are the parties to a complaint in a better position to determine what information is needed to support their cases than Media Bureau staff, thus establishing expanded discovery procedures as fairer to all parties than Commission-controlled discovery? Should we make clear that expanded discovery procedures apply to all forms of discovery, including document production, interrogatories, and depositions?[176] We note that, as described below, to ensure that confidential information is not improperly used for competitive business purposes, we seek comment on adopting a more stringent standard protective order and declaration than is currently used in program access cases.[177]

43. One potential concern with expanded discovery procedures is that they will lead to overbroad discovery requests and extended disputes pertaining to relevance, which the Commission recognized as a concern in the *1993 Program Carriage Order* when it allowed for only Commission-controlled discovery.[178] To ensure an expeditious discovery process, should we impose a numerical limit on the number of document requests, interrogatories, and depositions a party may request? Should we establish specific deadlines for the discovery process in order to enable the Media Bureau to meet the 150-calendar-day resolution deadline? For example, although not currently specified in our program access rules, we seek comment on whether to establish deadlines by when parties must submit discovery requests, objections thereto, and replies to objections, such as 20, 25, and 30 calendar days respectively after the Media Bureau's *prima facie* determination in which it states that it will rule on the merits of the complaint after discovery.[179] We also seek comment on whether to require the parties to meet and confer to attempt to mutually resolve their discovery disputes and to submit a joint comprehensive discovery proposal to the Media Bureau within 40 calendar days after the Media Bureau's *prima facie* determination, with any remaining unresolved issues to be ruled on by the Media Bureau. We also seek input on whether to establish a firm deadline for when discovery must be completed, such as 75 calendar

[174] *See* 47 C.F.R. § 76.1003(j); *2007 Program Access Order*, 22 FCC Rcd at 17852-53, ¶¶ 98-99.

[175] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21 (establishing that, in cases that the Media Bureau decides on the merits after discovery, the Media Bureau must issue a decision within 150 calendar days after its *prima facie* determination). We note that while the Commission has established aspirational goals for the resolution of program access complaints, those deadlines do not apply to cases involving complex discovery. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Report and Order, 13 FCC Rcd 15822, 15842-43, ¶ 41 (1998) ("*1998 Program Access Order*"); *see also 2007 Program Access Order*, 22 FCC Rcd at 17857, ¶ 108 (reaffirming aspirational goals set forth in the *1998 Program Access Order*).

[176] *Compare 1993 Program Carriage Order*, 9 FCC Rcd at 2652, ¶ 23 and 2655-56, ¶ 32 (referring to the Media Bureau's ordering of document production and interrogatories) *with* 47 C.F.R. 76.7(f)(1) (referring to the Media Bureau's ordering of depositions in addition to document production and interrogatories).

[177] *See infra* ¶ 48.

[178] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2655-56, ¶ 32; *see also id.* at 2652, ¶ 23.

[179] As discussed above, after finding that the complainant has established a *prima facie* case, the Media Bureau could rule on the merits of a complaint based on the pleadings without discovery. *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21. The deadlines related to discovery discussed here would be triggered only if the Media Bureau's decision finding that the complainant has established a *prima facie* case states that the Media Bureau will issue a ruling on the merits of the complaint after discovery.

days after the Media Bureau's *prima facie* determination, and for the submission of post-discovery briefs and reply briefs, such as 20 calendar days and ten calendar days, respectively, after the conclusion of discovery.[180] With these deadlines, the Media Bureau would have 45 days to prepare and release a decision on the merits.

2. Automatic Document Production

44. In addition to expanded discovery procedures, we seek comment on an automatic document production process that is narrowly tailored to the issues raised in program carriage complaints. Under this approach, if the Media Bureau issues a decision finding that a complaint contains sufficient evidence to establish a *prima facie* case and stating that it will rule on the merits of the complaint after discovery, both parties would have a certain period of time to produce basic threshold documents listed in the Commission's rules that are relevant to the program carriage claim at issue. The Commission adopted a similar approach for comparative broadcast proceedings involving applications for new facilities.[181] Under those procedures, after the issuance of an HDO, applicants were required to produce documents enumerated in a standardized document production order set forth in the Commission's rules.[182] The Commission adopted this approach because it would result in "substantial time savings."[183] Should we establish a similar approach for program carriage cases? We believe that this process could work in conjunction with the expanded discovery procedures outlined above. For example, within ten calendar days after the Media Bureau issues a decision finding that the complaint contains sufficient evidence to establish a *prima facie* case and stating that it will rule on the merits of the complaint after discovery, both parties would produce the documents in the automatic document production list set forth in the Commission's rules for the specific program carriage claim at issue.[184] Is this a sufficient amount of time for production, considering that the required documents will be listed in our rules and thus parties will have advanced notice as to what documents must be produced? Based on the documents produced, the parties would then proceed to request additional discovery pursuant to the deadlines set forth above (*i.e.*, discovery requests, objections thereto, and responses to objections would be due 20, 25 and 30 calendar days respectively after the Media Bureau's *prima facie* determination). To the extent that we do not adopt automatic document production, the initial ten-day production period would not be required; thus, we also seek comment on more expeditious deadlines for submitting discovery requests, objections thereto, and responses to objections in the event we do not adopt automatic document production.

45. We seek input on whether automatic document production will result in substantial time savings and thereby more expeditious resolution of program carriage complaints. We ask commenters to consider the following ways in which automatic document production might expedite discovery. First, by establishing that certain documents are relevant for a program carriage claim, automatic document production should reduce delay resulting from debates over relevancy. Second, automatic document

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[180] *See* 47 C.F.R. § 76.7(e)(3) (stating that the Commission may, in its discretion, require the parties to file briefs summarizing the facts and issues presented in the pleadings and other record evidence).

[181] *See* 47 C.F.R.§ 1.325(c)(1); *see also 1990 Comparative Hearing Order*, 5 FCC Rcd 157, ¶¶ 25-29.

[182] *See* 47 C.F.R.§ 1.325(c)(1).

[183] *See 1990 Comparative Hearing Order*, 5 FCC Rcd 157, ¶ 25; *see also id.* at ¶ 27 ("With the early provision of the information required in the standardized document production order and the uniform integration statement, we would expect that the remainder of the discovery process could be expedited.").

[184] As discussed above, after finding that the complainant has established a *prima facie* case, the Media Bureau might rule on the merits of a complaint based on the pleadings without discovery. *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 21. The deadlines related to automatic document production discussed here would be triggered only if the Media Bureau's decision finding that the complainant has established a *prima facie* case states that the Media Bureau will issue a ruling on the merits of the complaint after discovery.

production should enable the parties to identify early in the discovery process any individuals they seek to depose. Third, by providing advanced notice of documents that are relevant, parties should have sufficient time to gather these documents and to produce them promptly. Fourth, automatic document production may prevent delays in obtaining any necessary third-party consent. Production of certain documents, such as programming contracts, may require third-party consent before disclosure, resulting in a delay in the production of documents. The automatic document production list should help address this concern by providing the parties with advanced notice that they may have to produce certain documents in the event of a *prima facie* finding, thus providing parties with time to secure any required third-party consents. Are there any other advantages or disadvantages with an automatic document production process?

46. To the extent we adopt an automatic document production process, we seek comment on what documents must be produced. The types of documents will necessarily vary based on whether the claim is a violation of the financial interest, exclusivity, or discrimination provision. Below we suggest some documents that might be considered sufficiently relevant to include in the automatic document production list. We seek comment on whether specific documents should be added or removed.

Financial Interest Claim

- All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant MVPD;
- All documents relating to the defendant MVPD's interest in obtaining or plan to obtain a financial interest in the complainant or the video programming at issue in the complaint; and
- All documents relating to the programming vendor's consideration of whether to provide the defendant MVPD with a financial interest in the complainant or the video programming at issue in the complaint.

Exclusivity Claim

- All documents relating to carriage or requests for carriage of the video programming at issue in the complaint by the defendant MVPD;
- All documents relating to the defendant MVPD's interest in obtaining or plan to obtain exclusive rights to the video programming at issue in the complaint; and
- All documents relating to the programming vendor's consideration of whether to provide the defendant MVPD with exclusive rights to the video programming at issue in the complaint.

Discrimination Claim

- All documents relating to the defendant MVPD's carriage decision with respect to the complainant's video programming at issue in the complaint, including (i) the defendant MVPD's reasons for not carrying the video programming or the defendant MVPD's reasons for proposing, rejecting, or accepting specific carriage terms; and (ii) the defendant MVPD's evaluation of the video programming;
- All documents comparing, discussing the similarities or differences between, or discussing the extent of competition between the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, including in terms of genre, ratings, license fee, target audience, target advertisers, and target programming;
- All documents relating to the impact of defendant MVPD's carriage decision on the ability of the complainant, the complainant's video programming at issue in the complaint, the defendant MVPD, and the allegedly similarly situated, affiliated video programming to compete, including the impact on (i) subscribership; (ii) license fee revenues; (iii) advertising revenues; (iv) acquisition of advertisers; and (v) acquisition of programming rights;

- For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, all documents (both internal documents as well as documents received from MVPDs, but limited to the ten largest MVPDs in terms of subscribers with which the complainant or the affiliated programming vendor have engaged in carriage discussions regarding the video programming) discussing the reasons for the MVPD's carriage decisions with respect to the video programming, including (i) the MVPD's reasons for not carrying the video programming or the MVPD's reasons for proposing, rejecting, or accepting specific carriage terms; and (ii) the MVPD's evaluation of the video programming; and
- For the complainant's video programming at issue in the complaint and the allegedly similarly situated, affiliated video programming, current affiliation agreements with the ten largest MVPDs (including, if not otherwise covered, the defendant MVPD) carrying the video programming in terms of subscribers.

47. Should our rules limit the automatic production of documents to those generated or received after a certain date, such as within three years prior to the complaint? Should our rules require the parties to establish a privilege log describing the documents that have been withheld along with support for any claim of privilege? Should we specify in our rules that the Media Bureau has the discretion to add or remove documents from this automatic production list based on the specific facts of a case when issuing its *prima facie* decision? Rather than specifying a list of documents in our rules, should we instead require the Media Bureau when issuing a *prima facie* decision to order the production of documents based on the specific facts of the case? Will this eliminate the benefits of advanced notice discussed above?

3. Protective Orders

48. We note that one source of delay in the discovery process is the need for the parties to negotiate and obtain approval of a protective order before producing confidential information. For program access cases, we have established a standard protective order and declaration.[185] While parties to program access cases are free to negotiate their own protective order, they may also rely upon this standard protective order. We seek comment on whether the program access protective order is sufficiently stringent to ensure that confidential information is not improperly used for competitive business purposes, or whether we should adopt a more stringent standard protective order for program carriage cases. To the extent commenters have specific concerns with using the program access standard protective order and declaration for program carriage cases, we ask that they propose specific changes and an explanation of their reason for their proposed changes.[186] If parties to a program carriage complaint are unable to mutually agree to their own protective order prior to the ten-day automatic production deadline discussed above, should the parties be deemed to have agreed to the standard protective order, thereby allowing document production to proceed? To the extent that the automatic document production list or discovery in general requires production of documents, such as programming contracts, that require third-party consent before disclosure, does the standard protective order address reasonable concerns commonly expressed by third parties or should specific provisions be added to address those concerns?

[185] *See* 47 C.F.R. § 76.1003(k); *2007 Program Access Order*, 22 FCC Rcd at 17853-55, ¶¶ 100-103 and Appendix E, 17894-99. The standard protective order and declaration used in program access cases is attached hereto at Appendix E.

[186] We note that a Petition for Reconsideration of the *2007 Program Access Order* is pending that argues that the standard protective order should include a mechanism whereby a party can object to a specific individual seeking access to confidential information; should allow only outside counsel to access certain information; and should provide the parties with the right to prohibit copying of highly sensitive documents. *See* Fox Entertainment Group, Inc., Petition for Reconsideration, MB Docket No. 07-29 (Nov. 5, 2007), at 8-10.

Are there any other actions we can take to prevent third-party consent requirements from delaying the completion of discovery?

4. Use of Discovery Procedures in Program Carriage Cases Referred to an ALJ

49. We also seek comment on the extent to which any of the discovery proposals outlined above should apply to program carriage complaints referred to an ALJ. As an initial matter, we note that cases referred to an ALJ generally involve a hearing, which raises additional complexities not applicable to cases handled by the Media Bureau. Moreover, our rules set forth specific discovery procedures applicable to adjudicatory proceedings conducted before an ALJ[187] and also provide the ALJ with authority to "[r]egulate the course of the hearing."[188] Nonetheless, we seek comment as to whether and how the discovery deadlines suggested above, the automatic document production lists, or the model protective order might be used in conjunction with program carriage complaints referred to an ALJ.

C. Damages

50. We propose to adopt rules allowing for the award of damages for violations of the program carriage rules that are identical to those adopted for program access cases. Section 616(a)(5) of the Act directs the Commission to adopt regulations that "provide for appropriate penalties and remedies for violations of [Section 616], including carriage."[189] Although the program carriage statute does not explicitly direct the Commission to allow for the award of damages as a remedy for a program carriage violation, the statute does require the Commission to adopt "appropriate . . . remedies."[190] The Commission has interpreted this same term as used in the program access statute[191] as broad enough to include a remedy of damages, stating that:

> Although petitioners are correct that the statute does not expressly use the term "damages," it does expressly empower the Commission to order "appropriate remedies." Because the statute does not limit the Commission's authority to determine what is an appropriate remedy, and damages are clearly a form of remedy, the plain language of this part of Section 628(e) is consistent with a

[187] *See* 47 C.F.R. §§ 1.311-1.340.

[188] *See* 47 C.F.R. § 1.243(f).

[189] 47 U.S.C. § 536(a)(5).

[190] *See id.* In the *1993 Program Carriage Order*, the Commission stated that it would "determine the appropriate relief for program carriage violations on a case-by-case basis" and that available remedies and sanctions "include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission," but did not explicitly include or exclude damages. *1993 Program Carriage Order*, 9 FCC Rcd at 2653, ¶ 26.

[191] 47 U.S.C. § 548(e)(1) ("Upon completion of such adjudicatory proceeding, the Commission shall have the power to order *appropriate remedies*, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.") (emphasis added). Although the Commission initially concluded that it did not have authority to assess damages in program access cases, it later reversed that decision. *Compare Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3392, ¶ 81 (1993) ("*1993 Program Access Order*") *with Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 10 FCC Rcd 1902, 1910-11, ¶ 17 (1994) ("*1994 Program Access Reconsideration Order*").

finding that the Commission has authority to afford relief in the form of damages.[192]

We seek comment on whether the Commission has authority to award damages in program carriage cases under the same analysis.

51. We believe that allowing for the award of damages would be useful in deterring program carriage violations and promoting settlement of any disputes. We seek comment on this view. If we adopt rules allowing for the award of damages in program carriage cases, we propose to apply the same policies that apply in program access cases. In the program access context, the Commission has stated that damages would not promote competition or otherwise benefit the video marketplace in cases where a defendant relies upon a good faith interpretation of an ambiguous aspect of our rules for which there is no guidance.[193] Conversely, the Commission has explained that damages are appropriate when a defendant knew or should have known that its conduct would violate the rules.[194] We request comment on this approach. In addition, consistent with our program access rules, we propose to adopt rules allowing for the award of compensatory damages in program carriage cases. We do not propose to allow for awards of attorney's fees. We seek comment on whether the Commission has legal authority to make awards of punitive damages. Section 616(a)(5) of the Act directs the Commission to adopt regulations that "provide for appropriate penalties."[195] Courts have recognized that "penalties" may take various forms, including punitive damages, fines, and statutory penalties, all of which are aimed at deterring wrongful conduct.[196] We note, however, that the Commission previously declined to allow for the award of punitive damages in program access cases.[197] We seek comment on whether there is any basis for awarding punitive damages in program carriage cases but not in program access cases. To what extent would the potential award of punitive damages help to deter program carriage violations and promote settlement of any disputes?

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[192] *See 1994 Program Access Reconsideration Order*, 10 FCC Rcd at 1910-11, ¶ 17; *see also 1998 Program Access Order*, 13 FCC Rcd at 15831-32, ¶¶ 14-15 (reaffirming the Commission's statutory authority to award damages in program access cases). Although the Commission held that it had authority to award damages in program access cases, it initially elected not to exercise that authority, finding that other sanctions available to the Commission were sufficient to deter entities from violating the program access rules. *See 1994 Program Access Reconsideration Order*, 10 FCC Rcd at 1911, ¶ 18. The Commission later adopted rules allowing for the award of damages in program access cases, stating that "[r]estitution in the form of damages is an appropriate remedy to return improper gains." *1998 Program Access Order*, 13 FCC Rcd at 15833, ¶ 17. We note that the Commission has held that Section 325(b)(3)(C) of the Act pertaining to retransmission consent negotiations, which does not contain the same "appropriate remedies" language, does not authorize the award of damages. *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5480, ¶ 82 (2000) ("We can divine no intent in Section 325(b)(3)(C) to impose damages for violations thereof. . . . Commenters' reliance on the program access provisions as support for a damages remedy in this context is misplaced. The Commission's authority to impose damages for program access violations is based upon a statutory grant of authority.").

[193] *See 1998 Program Access Order*, 13 FCC Rcd at 15833, ¶ 18.

[194] *See* 47 C.F.R. § 76.1003(d)(2); *1998 Program Access Order*, 13 FCC Rcd at 15833, ¶ 18.

[195] 47 U.S.C. § 536(a)(5).

[196] *See Leister v. Dovetail, Inc.*, 546 F.3d 875, 883 (7th Cir. 2008).

[197] The Commission based its decision to decline to allow for the award of punitive damages in program access cases based on a lack of record evidence regarding the need for this type of damages. *See 1998 Program Access Order*, 13 FCC Rcd at 15834, ¶ 21.

52. We note that the Commission has also adopted specific procedures for requesting and awarding damages in program access cases.[198] We propose to apply these same procedures to the award of damages in the program carriage context. While we briefly summarize some of these procedures here, we encourage commenters to review these procedures in their entirety as set forth in Sections 76.1003(d) and 76.1003(h)(3) of the Commission's rules and the *1998 Program Access Order* to determine whether they are appropriate for program carriage cases.[199] Under the program access rules, a complainant seeking damages must provide in its complaint either (i) a detailed computation of damages (the "damages calculation"); or (ii) an explanation of the information that is not in its possession and needed to compute damages, why such information is unavailable to the complainant, the factual basis the complainant has for believing that such evidence of damages exists, and a detailed outline of the methodology that would be used to compute damages with such evidence (the "damages computation methodology").[200] The burden of proof regarding damages rests with the complainant.[201] The procedures provide for the bifurcation of the program access violation determination from the damages determination.[202] In ruling on whether there has been a program access violation, the Media Bureau is required to indicate in its decision whether damages are appropriate.[203] The Commission's aspirational deadline for resolving the program access complaint applies solely to the program access violation determination and not to the damages determination.[204] The Commission has explained that the appropriate date from which damages accrue is the date on which the violation first occurred, and that the burden is on the complainant to establish this date.[205] Moreover, based on the one-year limitations period for bringing program access complaints, the Commission has explained that it will not entertain damages claims asserting injury pre-dating the complaint by more than one year.[206] In cases in which the complainant has submitted a damages calculation and the Media Bureau approves or modifies the calculation, the defendant is required to compensate the complainant as directed in the Media Bureau's order.[207] In cases in which the complainant has submitted a damages computation methodology and the Media Bureau approves or modifies the methodology, the parties are required to negotiate in good faith to reach an agreement on the exact amount of damages pursuant to the methodology.[208] We seek comment on the appropriateness of adopting similar rules in the program carriage context.

53. We also propose to adopt similar procedures for requesting the application of new prices, terms, and conditions in the event an adjudicator reaches a decision on the merits of a program carriage complaint after the Media Bureau issues a standstill order. In the *Second Report and Order* in MB Docket No. 07-42, we adopted specific procedures for the Media Bureau's consideration of requests for a temporary standstill of the price, terms, and other conditions of an existing programming contract by a

[198] *See* 47 C.F.R. § 76.1003(d), (h)(3); *1998 Program Access Order*, 13 FCC Rcd at 15836-39, ¶¶ 27-33.

[199] *See* 47 C.F.R. § 76.1003(d), (h)(3); *1998 Program Access Order*, 13 FCC Rcd at 15836-39, ¶¶ 27-33.

[200] *See* 47 C.F.R. § 76.1003(d)(3); *1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[201] *See* 47 C.F.R. § 76.1003(h)(3)(ii); *1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[202] *See* 47 C.F.R. § 76.1003(h)(3)(i); *1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[203] *See 1998 Program Access Order*, 13 FCC Rcd at 15836-37, ¶ 28.

[204] *See id.* at 15836, ¶ 28 n.84 and 15842-43, ¶ 41.

[205] *See id.* at 15839, ¶ 33.

[206] *See id.* at 15836-37, ¶ 28.

[207] *See* 47 C.F.R. § 76.1003(h)(3)(iii)(A)(1); *1998 Program Access Order*, 13 FCC Rcd at 15837-38, ¶ 30.

[208] *See* 47 C.F.R. § 76.1003(h)(3)(iii)(A)(2); *1998 Program Access Order*, 13 FCC Rcd at 15837-38, ¶ 30.

program carriage complainant seeking renewal of such a contract.[209] If the Media Bureau grants the temporary standstill, the rules adopted provide that the adjudicator ruling on the merits of the complaint will apply the terms of the new agreement between the parties, if any, as of the expiration date of the previous agreement.[210] We noted that application of new terms may be difficult in some cases, such as if carriage of the video programming has continued uninterrupted during resolution of the complaint as a result of the Media Bureau's standstill order, but the decision on the merits provides that the defendant MVPD may discontinue carriage.[211] While we believe the adjudicator can address these issues on a case-by-case basis in the absence of a new rule on this point, adoption of specific procedures addressing compensation of the parties during the standstill period, if any, may facilitate the expeditious resolution of these issues. For example, should a defendant MVPD that ultimately prevails on the merits nonetheless be required to pay for carriage during the standstill period? Should we assume that the previously negotiated carriage fees reflected in the parties' expired agreement represent reasonable compensation for the carriage of the programming during the standstill period? We propose to adopt procedures similar to those set forth above for requesting damages.[212] Specifically, in the event the Media Bureau has issued a standstill order, the adjudicator after reaching a decision on the merits may request the prevailing party to submit either (i) a detailed computation of the fees and/or compensation it believes it is owed during the standstill period based on the new prices, terms, and conditions ordered by the adjudicator (the "true-up calculation"); or (ii) a detailed outline of the methodology used to calculate the fees and/or compensation it believes it is owed during the standstill period based on the new prices, terms, and conditions ordered by the adjudicator (the "true-up computation methodology"). The burden of proof would rest with the party seeking compensation during the standstill period based on the new prices, terms, and conditions. In cases in which the adjudicator approves or modifies a prevailing party's true-up calculation, the opposing party would be required to compensate the prevailing party as directed in the adjudicator's order. In cases in which the adjudicator approves or modifies a true-up computation methodology, the parties would be required to negotiate in good faith to reach an agreement on the exact amount of compensation pursuant to the methodology. We seek comment on this approach.

D. Submission of Final Offers

54. Among the remedies an adjudicator can order for a program carriage violation is the establishment of prices, terms, and conditions for the carriage of a complainant's video programming.[213] To the extent that the adjudicator orders this remedy, we propose to adopt a rule providing that the adjudicator will have the discretion to order each party to submit their "final offer" for the rates, terms, and conditions for the video programming at issue.[214] In previous merger orders, the Commission has explained that requiring parties to a programming dispute to submit their final offer for carriage and

[209] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶¶ 25-30.

[210] *See id.* at ¶¶ 28-29.

[211] *See id.* at ¶ 29.

[212] *See supra* ¶ 52.

[213] *See* 47 C.F.R. § 76.1302(g)(1); *1993 Program Carriage Order*, 9 FCC Rcd at 2653, ¶ 26 ("Available remedies and sanctions include forfeitures, mandatory carriage, or carriage on terms revised or specified by the Commission."). This rule will now appear at Section 76.1302(j)(1) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07-42 take effect. *See infra*, Appendix B.

[214] *See Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Second Report and Order, FCC 11-52, ¶ 79 (2011) (stating that, when considering the commercial reasonableness of the terms and conditions of a proffered data roaming arrangement, the Commission staff may, in resolving such a claim, require both parties to provide to the Commission their best and final offers that were presented during the negotiation).

requiring the adjudicator to select the offer that most closely approximates fair market value "has the attractive 'ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected . . . .'"[215] We seek comment on the extent to which providing the adjudicator with the discretion to require the parties to submit final offers will encourage the parties to resolve their differences through settlement and will assist the adjudicator in crafting an appropriate remedy should the parties not settle their dispute.[216] We also seek comment on whether submission of final offers will enable the adjudicator to reach a more expeditious resolution of the complaint.

55. To the extent the adjudicator requests the submission of final offers, we seek comment on whether the adjudicator should be required to select one of the parties' final offers as the remedy or whether the adjudicator should have the discretion to craft a remedy that combines elements of both final offers or contains other terms that the adjudicator finds to be appropriate. While requiring the adjudicator to select one of the final offers might be more effective in encouraging the parties to submit reasonable offers and promoting a settlement, we expect that providing the adjudicator with the discretion to craft a remedy combining elements of both final offers (*e.g.*, the rate in one offer and the contract term in the other offer) or other terms that the adjudicator finds to be appropriate will provide greater flexibility, possibly resulting in a more appropriate remedy. We seek comment on the ramifications of each approach. We also seek comment on when the adjudicator should solicit final offers to the extent the adjudicator exercises the discretion to do so. As in the case of damages discussed above, should the adjudicator bifurcate the program carriage violation determination from the remedy phase to facilitate the submission of final offers, similar to the way damages are handled in program access cases?[217]

E. Mandatory Carriage Remedy

56. The program carriage rules provide that the remedy ordered by the Media Bureau or ALJ is effective upon release of the decision, except when the adjudicator orders mandatory carriage that will require the defendant MVPD to "delete existing programming from its system to accommodate carriage" of a programming vendor's video programming.[218] In such a case, if the defendant MVPD seeks Commission review of the decision, the mandatory carriage remedy does not take effect unless and until the decision is upheld by the Commission.[219] If the Commission upholds in its entirety the relief granted by the adjudicator, the defendant MVPD is required to carry the video programming at issue in the complaint for an additional time period beyond that originally ordered by the adjudicator, equal to the amount of time that elapsed between the adjudicator's decision and the Commission's final decision, on the terms ordered by the adjudicator and upheld by the Commission.[220] One potential benefit of this rule is that it ensures that consumers do not lose programming carried by their MVPD in the event a Media Bureau or ALJ decision granting carriage is ultimately overturned by the Commission.

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[215] *See News Corp-Hughes Order,* 19 FCC Rcd at 552, ¶ 174 (quoting Steven J. Brams, *Negotiation Games: Applying Game Theory to Negotiation and Arbitration*, Routledge, 2003 at 264).

[216] *See* Comcast Reply at 34 n.116 (noting practical concerns with a mandatory carriage remedy).

[217] *See supra* ¶ 52 (seeking comment on procedures for awarding damages in program carriage cases).

[218] *See* 47 C.F.R. § 76.1302(g)(1); *1993 Program Carriage Order*, 9 FCC Rcd at 2656, ¶ 33 (discussing mandatory carriage remedy in cases ruled on by Media Bureau); *id.* at 2656, ¶ 34 (discussing mandatory carriage remedy in cases ruled on by ALJ). This rule will now appear at Section 76.1302(j)(1) once the amendments adopted in the *Second Report and Order* in MB Docket No. 07-42 take effect. *See infra*, Appendix B.

[219] *See supra* n.218.

[220] *See id.*

57. As an initial matter, we seek comment on the need for this rule. We note that any party can seek a stay of a Media Bureau or ALJ decision while a review is pending before the Commission.[221] Is it necessary to have a rule specific to program carriage complaints that allows only the defendant MVPD to avoid the need to seek a stay? Should a similar rule apply if a programming vendor's video programming will be deleted from the defendant MVPD's system as a result of a Media Bureau or ALJ decision, thereby resulting in lost video programming for consumers? For example, if the Media Bureau grants a standstill for a complainant programming vendor seeking renewal of an existing contract but the adjudicator rules on the merits that the defendant MVPD's decision to delete the video programming does not violate the program carriage rules, should that ruling take effect only if the decision is upheld by the Commission?

58. To the extent that we retain Section 76.1302(g)(1), we are concerned that the rule is unclear with respect to the type of showing a defendant MVPD must make to satisfy the rule and thereby delay the effectiveness of the remedy. We propose to amend this rule to clarify that the defendant MVPD must make a sufficient evidentiary showing to the adjudicator demonstrating that it would be required to delete existing programming to accommodate the video programming at issue in the complaint. As in the case of damages and submission of final offers discussed above, should the adjudicator bifurcate the program carriage violation determination from the remedy phase to allow for the defendant MVPD's evidentiary showing on this issue?

59. We also seek comment on whether we should clarify what "deletion" of existing programming means in this context. For example, if the mandatory carriage remedy forces the defendant MVPD to move existing programming to a less-penetrated tier but does not force the defendant MVPD to remove the programming from its channel line-up entirely, should that be considered "deletion" of existing programming? While we expect that an adjudicator can resolve such issues on a case-by-case basis,[222] should we provide specific guidance in our rules as to what constitutes "deletion"? Would providing guidance on this issue avoid the need for the adjudicator to make a case-by-case determination and thereby lead to a more expeditious and consistent resolution of program carriage complaints?

F. Retaliation

60. Programming vendors have expressed concern that MVPDs will retaliate against them for filling program carriage complaints.[223] They state that the fear of retaliation is preventing programming vendors from filing legitimate program carriage complaints.[224] As an initial matter, we note that the

[221] *See Brunson Commc'ns, Inc. v. RCN Telecom. Servs. Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 12883 (CSB 2000) (granting stay request pending action on Application for Review); *see also* 47 C.F.R. § 76.10(c)(2). To obtain a stay, a petitioner must demonstrate that (i) it is likely to prevail on the merits; (ii) it will suffer irreparable harm absent a stay; (iii) grant of a stay will not substantially harm other interested parties; and (iv) the public interest favors grant of a stay. *See, e.g., Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *see also Washington Metropolitan Area Transit Comm'n v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977) (clarifying the standard set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*); *Hispanic Information and Telecomm. Network, Inc.*, 20 FCC Rcd 5471, 5480, ¶ 26 (2005) (affirming Bureau's denial of request for stay on grounds applicant failed to establish four criteria demonstrating stay is warranted).

[222] *See Tennis Channel HDO*, 25 FCC Rcd at 14163, ¶ 24 n.120 (directing the ALJ to determine whether a remedy requiring a defendant MVPD to carry the complainant programming vendor's video programming on a specific tier or to a specific number or percentage of subscribers would "require [the defendant MVPD] to delete existing programming from its system to accommodate carriage of" the complainant programming vendor's video programming).

[223] *See* BTNC Comments at 4; NAMAC Comments at 18-19; NFL Enterprises Comments at 8 n.28.

[224] *See* BTNC Comments at 4; NFL Enterprises Reply at 6.

standstill procedure we adopt in the *Second Report and Order* in MB Docket No. 07-42 will help to prevent retaliation in part while a program carriage complaint is pending.[225] If granted, the standstill will keep in place the price, terms, and other conditions of an existing programming contract during the pendency of the complaint, thus preventing the defendant MVPD from taking adverse action during this time against the programming vendor with respect to the video programming at issue in the complaint. We seek comment on whether there are any circumstances in the program carriage context in which the Commission's authority to issue temporary standstill orders is statutorily or otherwise limited.[226]

61. Programming vendors' concerns regarding retaliation, however, extend beyond the period while a complaint is pending and beyond the particular programming that is the subject of the complaint. They fear that an MVPD will seek to punish a programming vendor for availing itself of the program carriage rules after the complaint has been resolved.[227] Another potential form of retaliation could impact programming vendors owning more than one video programming network. For example, if a programming vendor owning more than one video programming network brings a program carriage complaint involving one particular video programming network, the defendant MVPD could potentially take a retaliatory adverse carriage action involving another video programming network owned by the programming vendor.

62. We seek comment on the extent to which retaliation has occurred in the past. We note that eleven program carriage complaints have been filed since the Commission adopted its program carriage rules in 1993. Have any of the complainants experienced retaliation by MVPDs? Have any other programming vendors experienced retaliation by MVPDs for merely suggesting that they might avail themselves of the program carriage rules? We note that examples of actual retaliation or threats of retaliation will assist in developing a record on whether and how to address concerns regarding retaliation.

63. We also seek comment on what measures the Commission should take to address retaliation. As an initial matter, we believe that retaliation may be addressed in some cases through a program carriage complaint alleging discrimination on the basis of affiliation. For example, if an MVPD takes an adverse carriage action against a programming vendor after the vendor files a complaint, the programming vendor may have a legitimate discrimination complaint if it can establish a *prima facie* case of discrimination on the basis of affiliation, such as by showing that the defendant MVPD treated its similarly situated, affiliated video programming differently.[228] If the case proceeds to the merits, the defendant MVPD obviously could not defend its action by claiming it was motivated by a desire to retaliate against the programming vendor.

64. Addressing retaliation through a discrimination complaint, however, is not useful in cases where the defendant MVPD takes retaliatory action with respect to video programming affiliated with the complainant programming vendor that is not similarly situated to video programming affiliated with the

[225] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶¶ 25-30.

[226] *See* NCTA July 1 2011 *Ex Parte* Letter at 1 (*citing* 47 U.S.C. § 544(f)(1)). *But see United Video, Inc. v. FCC,* 890 F.2d 1173, 1189 (D.C. Cir. 1989) ("The House report [to section 624(f)] suggests that Congress thought a cable company's owners, not government officials, should decide what sorts of programming the company would provide. But it does not suggest a concern with regulations of cable that are not based on the content of cable programming, and do not require that particular programs or types of programs be provided.").

[227] *See* NAMAC Comments at 18-19; NAIN June 5 2008 *Ex Parte* Letter, Attachment at 1.

[228] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 14 (discussing evidence required to establish a *prima face* case of a violation of the discrimination provision). The complaint must also contain evidence that the defendant MVPD's conduct has the effect of unreasonably restraining the ability of the complainant programming vendor to compete fairly. *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 15.

defendant MVPD. For example, a programming vendor owning an RSN may bring a complaint alleging that the defendant MVPD engaged in discrimination on the basis of affiliation by refusing to carry the RSN. The defendant MVPD could potentially retaliate by refusing to carry a news channel affiliated with the complainant programming vendor. To the extent the defendant MVPD is not affiliated with a news channel, however, the programming vendor would be unable to establish a *prima facie* case of discrimination on the basis of affiliation by showing that the defendant MVPD treated its own affiliated news channel differently. To address this concern, we seek comment on whether we should adopt a new rule prohibiting an MVPD from taking an adverse carriage action against a programming vendor because the programming vendor availed itself of the program carriage rules. The adverse carriage action could involve any video programming owned by or affiliated with the complainant programming vendor, not just the particular video programming subject to the initial complaint that triggered the retaliatory action. To the extent we adopt the automatic document production process described above,[229] we seek comment on what documents might be considered sufficiently relevant to a retaliation claim to include in the automatic document production list.

65. We seek comment on the extent of our authority to adopt an anti-retaliation provision in light of the fact that this program carriage practice is not explicitly mentioned in Section 616. We note that Section 616 contains broad language directing the Commission to "establish regulations governing program carriage agreements and related practices between cable operators or other [MVPDs] and video programming vendors" and then lists six specific requirements that the Commission's program carriage regulations "shall provide for," "shall contain," or "shall include."[230] While there is no specific statutory provision prohibiting MVPDs from retaliating against programming vendors for filing complaints, the statute does not preclude the Commission from adopting additional requirements beyond the six listed in the statute. Thus, we believe that we have authority to adopt a rule prohibiting retaliatory carriage practices. We seek comment on this interpretation. To the extent any new substantive program carriage requirement must be based on one of the six requirements listed in the statute, does the discrimination provision in Section 616(a)(3) provide the statutory basis for an anti-retaliation rule? For example, we foresee that only a programming vendor that is unaffiliated with the defendant MVPD would bring a program carriage complaint against that MVPD; thus, absent such non-affiliation, a complaint would not have been filed and the MVPD would have no basis to retaliate. Thus, does an MVPD's decision to take a retaliatory adverse carriage action against a programming vendor specifically because the programming vendor availed itself of the program carriage rules amount to "discrimination on the basis of affiliation or non-affiliation"?[231] To the extent our authority to address retaliation is based on the discrimination provision in Section 616(a)(3), would the complainant also need to establish that the retaliatory adverse carriage action "unreasonably restrain[ed] the ability of [the programming vendor] to compete fairly"?[232] Does this limit the practical effect of the anti-retaliation provision by authorizing MVPDs to take retaliatory actions that fall short of an unreasonable restraint on the programming vendor's ability to compete fairly?

66. We seek comment on the practical impact of an anti-retaliation provision given that acts of retaliation are unlikely to be overt. That is, while an MVPD could potentially take a retaliatory adverse carriage action against a programming vendor following the filing of a complaint, it is highly doubtful that the defendant MVPD will inform the programming vendor that its action was motivated by retaliation. We seek comment on how programming vendors could bring legitimate retaliation complaints

[229] *See supra* ¶¶ 44-47.

[230] 47 U.SC. § 536.

[231] 47 U.SC. § 536(a)(3).

[232] *Id.*

in the absence of direct evidence of retaliation. For example, should we establish as a *prima facie* violation of the anti-retaliation rule any adverse carriage action taken by a defendant MVPD against a complainant programming vendor (other than the action at issue in the initial program carriage complaint) that occurs while a program carriage complaint is pending or within two years after the complaint is resolved on the merits? We seek comment on whether two years would be the appropriate time period. In establishing this time period, we seek to capture the period during which the defendant MVPD can reasonably be expected to have an incentive to retaliate while at the same time ensuring that we do not unduly hinder the defendant MVPD's legitimate carriage decisions with respect to the complainant programming vendor.

67. As discussed above, a finding of a *prima facie* violation does not resolve the merits of the case nor does it mean that the defendant has violated the Commission's rules.[233] Rather, it means that the complainant has alleged sufficient facts that, if left unrebutted, may establish a violation of the program carriage rules and thus parties may proceed to discovery (if necessary) and a decision on the merits. We do not believe that an anti-retaliation rule should apply to the defendant MVPD's action at issue in the initial program carriage complaint. For example, if the action at issue in the initial program carriage complaint involves the defendant MVPD's decision not to renew a contract for the complainant programming vendor's RSN and a standstill has not been granted, the action of the defendant MVPD to delete the RSN while the complaint is pending would not be a *prima facie* violation of the anti-retaliation rule. If, however, the defendant MVPD proceeds to move the complainant programming vendor's news channel to a less-penetrated tier after the filing of a complaint pertaining to an RSN, this may establish a *prima facie* violation under this rule. We seek comment on the extent to which such a rule would encourage the filing of frivolous program carriage complaints by programming vendors hoping to take advantage of the anti-retaliation rule to prevent MVPDs from taking adverse carriage actions based on legitimate business concerns. As set forth above, the rule would apply to adverse carriage actions while a complaint is pending or within two years after the complaint is resolved on the merits. A frivolous complaint would likely be dismissed at the *prima facie* stage, which the Media Bureau must resolve within no more than approximately 140 days after the complaint is filed.[234] Will this limited time period, along with our existing prohibition on frivolous complaints,[235] deter the filing of frivolous complaints intended to wrongly invoke the anti-retaliation rule as a shield against legitimate MVPD business decisions?

G. Good Faith Negotiation Requirement

68. We seek comment on whether to adopt a rule requiring vertically integrated MVPDs to negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD (or with another MVPD[236]). Some programming vendors claim that MVPDs do not overtly deny requests for carriage; rather, they claim that MVPDs effectively deny carriage and harm programming vendors in more subtle forms, such as failing to

[233] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 16.

[234] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 20 (requiring the Media Bureau to release a *prima facie* determination within 60 calendar days after the close of the 80-calendar-day pleading cycle on a program carriage complaint).

[235] *See* 47 C.F.R. § 76.6(c); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2657, ¶¶ 35-36.

[236] As discussed below, we seek comment on whether MVPDs favor not only their own affiliated programming vendors but also programming vendors affiliated with other MVPDs. *See infra* ¶¶ 72-77. To the extent this is the case, we seek comment below on whether a vertically integrated MVPD must negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD *or with another MVPD*. *See infra* ¶ 77.

respond to carriage requests in a timely manner, simply ignoring requests to negotiate for carriage, making knowingly inadequate counter-offers, or failing to engage in renewal negotiations until just prior to the expiration of an existing agreement.[237] We seek comment on the extent to which these concerns are legitimate and widespread and whether they would be addressed through the explicit good faith negotiation requirement described here for vertically integrated MVPDs.[238]

69. We note two important limitations on this good faith requirement. First, we are not aware of concerns regarding the negotiating tactics of non-vertically integrated MVPDs with respect to unaffiliated programming vendors. Accordingly, we believe it is appropriate to limit a good faith negotiation requirement to vertically integrated MVPDs only.[239] Second, we believe that this good faith requirement should extend only to negotiations involving video programming that is similarly situated to video programming affiliated with the MVPD (or with another MVPD). That is, to the extent that a vertically integrated MVPD is engaged in negotiations with an unaffiliated programming vendor involving video programming that is not similarly situated to video programming affiliated with the MVPD (or with another MVPD), there would appear to be no basis to assume that the MVPD would seek to favor its own video programming (or video programming affiliated with another MVPD) over the unaffiliated programming vendor's video programming on the basis of "affiliation" as opposed to legitimate business reasons. We seek comment on these views. Is this approach workable given that the concept of "similarly situated" is a subjective standard? That is, will an MVPD that does not want to carry the video programming simply claim that it does not have to negotiate because the video programming is not "similarly situated," leaving the programming vendor with claims for both discrimination and failure to negotiate in good faith, but not materially better off than if it just had the discrimination claim? Will this requirement encourage vertically integrated MVPDs to negotiate in good faith with both similarly situated and non-similarly situated video programming to avoid violating the good faith requirement? Will such a requirement unreasonably interfere with negotiations and limit the ability of vertically integrated MVPDs to pursue legitimate negotiation tactics?

70. We also seek comment on the extent of our authority to adopt this explicit good faith negotiation requirement for vertically integrated MVPDs in the program carriage context. As discussed above, we seek comment on the extent of our authority to adopt a new substantive program carriage rule, such as a good faith requirement, considering that this requirement is not explicitly mentioned in Section

[237] *See* BTNC Comments at 11-12; Outdoor Channel Nov. 16 2007 *Ex Parte* Letter at 1 (stating that MVPD-imposed negotiating delays after a prior contract has expired put programmers in the position of having to accept uncertain, month-to-month carriage arrangements that makes it difficult to invest in content); Hallmark Channel Nov. 20 *Ex Parte* Letter at 1 ("[S]ome MVPDs frequently fail to make carriage offers or respond to an independent programmer's offers until just before an existing agreement is set to expire, effectively turning post-expiration carriage into a month-to-month proposition."); *see id.* (stating that some MVPDs make "knowingly inadequate offers that give the superficial appearance of good faith negotiation but that are not intended or expected to be accepted, let alone thought responsive to the programmers' offers" and that such practices undercut the ability of the programmer to attract investors).

[238] *See* NFL Enterprises Comments at 7 (urging the Commission to impose "on MVPDs the same duty to bargain in good faith that currently applies to their retransmission consent negotiations with broadcasters").

[239] *See* Letter from American Cable Association et al. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Dec. 10, 2008) at 2 (stating that non-vertically integrated operators do not have any incentive to engage in conduct that would unreasonably restrain the ability of independent programmers to compete that would warrant changing existing rules to allow programmers to file discrimination or good faith complaints against them); Letter from John D. Goodman, Broadband Service Providers Association, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 07-42 (Dec. 9, 2008) at 2-3 (stating that non-vertically integrated operators have "no history of discriminating against independent programmers, nor have any incentive or ability to do so").

616.[240] Does the general grant of rulemaking authority under Section 616 provide a sufficient statutory basis for adopting this requirement?[241] To the extent any new substantive program carriage requirement must be based on one of the six requirements listed in the statute, does the discrimination provision in Section 616(a)(3) provide statutory authority for a good faith negotiation requirement?[242] Allegations that a vertically integrated MVPD has not negotiated in good faith could form the basis of a legitimate program carriage discrimination complaint. For example, to the extent that a vertically integrated MVPD carries affiliated video programming but refuses to engage in or needlessly delays negotiations with a programming vendor with respect to similarly situated, unaffiliated video programming, this may reflect discrimination on the basis of affiliation. To the extent that such a claim could already be addressed through a discrimination complaint, is it necessary to codify the requirement described above that vertically integrated MVPDs negotiate in good faith? Would codifying this requirement nonetheless provide guidance to programming vendors and vertically integrated MVPDs alike that action or inaction by a vertically integrated MVPD that effectively amounts to a denial of carriage is cognizable under the program carriage rules as a form of discrimination on the basis of affiliation? To the extent that our authority to adopt the good faith negotiation requirement described above would be based on the discrimination provision in Section 616(a)(3), would the complainant also need to establish that the adverse carriage action "unreasonably restrain[ed] the ability of [the programming vendor] to compete fairly"?[243] Does this limit the practical effect of a good faith negotiation requirement by authorizing vertically integrated MVPDs to engage in bad faith tactics that fall short of an unreasonable restraint on the programming vendor's ability to compete fairly? To the extent we adopt the automatic document production process described above,[244] we seek comment on what documents might be considered sufficiently relevant to a good faith claim to include in the automatic document production list.

71. To the extent we adopt the explicit good faith negotiation requirement for vertically integrated MVPDs described above, should we establish specific guidelines for assessing good faith negotiations? For example, in the retransmission consent context, the Commission has established seven objective good faith negotiation standards, the violation of which is considered a *per se* violation of the good faith negotiation obligation.[245] Should the Commission consider the same standards to determine whether a vertically integrated MVPD has negotiated in good faith in the program carriage context? Moreover, in the retransmission consent context, even if the seven standards are met, the Commission

[240] *See supra* ¶ 65.

[241] *See* 47 U.S.C. § 536(a).

[242] 47 U.S.C. § 536(a)(3).

[243] *See id.*

[244] *See supra* ¶¶ 44-47.

[245] *See* 47 C.F.R. § 76.65(b)(1) (The seven actions or practices that violate a duty to negotiate retransmission consent agreements in good faith are: "(i) Refusal by a Negotiating Entity to negotiate retransmission consent; (ii) Refusal by a Negotiating Entity to designate a representative with authority to make binding representations on retransmission consent; (iii) Refusal by a Negotiating Entity to meet and negotiate retransmission consent at reasonable times and locations, or acting in a manner that unreasonably delays retransmission consent negotiations; (iv) Refusal by a Negotiating Entity to put forth more than a single, unilateral proposal; (v) Failure of a Negotiating Entity to respond to a retransmission consent proposal of the other party, including the reasons for the rejection of any such proposal; (vi) Execution by a Negotiating Entity of an agreement with any party, a term or condition of which, requires that such Negotiating Entity not enter into a retransmission consent agreement with any other television broadcast station or multichannel video programming distributor; and (vii) Refusal by a Negotiating Entity to execute a written retransmission consent agreement that sets forth the full understanding of the television broadcast station and the multichannel video programming distributor."). We note that we are currently considering revisions to these rules. *See Retransmission Consent NPRM*, 26 FCC Rcd at 2729-35, ¶¶ 20-30.

may consider whether, based on the totality of the circumstances, a party failed to negotiate retransmission consent in good faith.[246] Should a similar policy apply to vertically integrated MVPDs in the program carriage context?

H. Scope of the Discrimination Provision

72. In the *1993 Program Carriage Order*, the Commission interpreted the discrimination provision in Section 616(a)(3) to require a complainant alleging discrimination that favors an "affiliated" programming vendor to provide evidence that the defendant MVPD has an attributable interest in the allegedly favored "affiliated" programming vendor.[247] Commenters, however, have claimed that vertically integrated MVPDs favor not only their own affiliated programming vendors but also programming vendors affiliated with other MVPDs.[248] For example, vertically integrated MVPD A might treat a news channel affiliated with MVPD B more favorably than an unaffiliated news channel in exchange for MVPD B's reciprocal favorable treatment of MVPD A's affiliated sports channel. In this case, the unaffiliated news channel would be unable to provide evidence that the defendant MVPD (MVPD A) has an attributable interest in the allegedly favored programming vendor (the news channel affiliated with MVPD B) as required under the *1993 Program Carriage Order*. We seek comment on whether we should address such situations by interpreting the discrimination provision in Section 616(a)(3) more broadly to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. Similar to the discussion above regarding the good faith requirement,[249] we are not aware of concerns that a non-vertically integrated MVPD would have an incentive to favor an MVPD-affiliated programming vendor over an unaffiliated programming vendor based on reasons of "affiliation" as opposed to legitimate business reasons. Accordingly, we believe it is appropriate to limit this interpretation of Section 616(a)(3) to vertically integrated MVPDs only. We seek comment on this proposed limitation.

73. We note that the Commission previously addressed a similar issue in connection with the channel occupancy limit set forth in Section 613(f)(1)(B) of the Act, which requires the Commission to establish "reasonable limits on the number of channels on a cable system that can be occupied by a video

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[246] *See* 47 C.F.R. § 76.65(b)(2) ("In addition to the standards set forth in § 76.65(b)(1), a Negotiating Entity may demonstrate, based on the totality of the circumstances of a particular retransmission consent negotiation, that a television broadcast station or multichannel video programming distributor breached its duty to negotiate in good faith as set forth in § 76.65(a)."). We note that we are currently considering revisions to these rules. *See Retransmission Consent NPRM*, 26 FCC Rcd at 2735-37, ¶¶ 31-33.

[247] *See 1993 Program Carriage Order*, 9 FCC Rcd at 2654, ¶ 29 ("For complaints alleging discriminatory treatment that favors 'affiliated' programming vendors, the complainant must provide evidence that the defendant has an attributable interest in the allegedly favored programming vendor, as set forth in Section 76.1300(a)."); *see also* 47 C.F.R. § 76.1300(a) ("For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."); *Review of the Commission's Cable Attribution Rules*, Report and Order, 14 FCC Rcd 19014, 19063, ¶ 132 n.333 (1999) (amending definition of "affiliated" in the program carriage rules to be consistent with definition of this term in other cable rules).

[248] *See* Hallmark Channel Reply at 8 n.16 ("In one important respect, an MVPD's incentive to discriminate against its competitor MVPDs is reduced. Specifically, an MVPD can have an incentive to advantage the affiliated services of other vertically-integrated MVPDs, over independent services, in exchange for favorable treatment when the first MVPD seeks to obtain carriage of its own affiliated services by the second MVPD. Like an MVPD's incentive to favor its own affiliated services, this behavior has a dramatic and anticompetitive impact on independent programmers' ability to bargain for fair carriage terms."); *see id.* at 20; NAMAC Reply at 16 (referring to the "common practice of cable operators to swap programming with each other").

[249] *See supra* ¶ 69.

programmer in which a cable operator has an attributable interest."[250] The Commission explained that this language is "not entirely clear because it can also be read as applying to carriage of video programmers affiliated with the particular cable operator or to carriage of any vertically integrated cable programmer on any cable system."[251] The Commission concluded that the "most reasoned approach" was to interpret this language "to apply such limits only to video programmers that are vertically integrated with the particular cable operator in question."[252] In adopting this interpretation, the Commission also concluded that "cable operators have very little incentive to favor video programming services that are affiliated solely with a rival MSO" and absent "significant empirical evidence of existing discriminatory practices, we see no useful purpose in limiting the ability of cable operators to carry programming affiliated with a rival MSO."[253] In 2008, however, the Commission adopted an *FNPRM* seeking comment on this conclusion in light of subsequent empirical studies as well as technological and marketplace developments.[254] In doing so, the Commission tentatively concluded to "expand the channel occupancy limit to include video programming networks owned by or affiliated with any cable operator," noting that such an interpretation is consistent with Section 628(c)(2)(D) of the Act, which prohibits any cable operator from entering into an exclusive contract with any cable-affiliated programmer.[255]

74. We seek comment on the extent to which there are real-world examples or reliable empirical studies demonstrating that vertically integrated MVPDs tend to favor programming vendors affiliated with other MVPDs. We note that the United States Court of Appeals for the D.C. Circuit previously struck down the Commission's horizontal cable ownership cap based in part on the Commission's failure to provide support for the concept that cable operators "have incentives to agree to buy their programming from one another."[256] In adopting a new horizontal ownership cap in 2008, the Commission concluded that it "lack[ed] evidence to draw definitive conclusions regarding the likelihood that cable operators will behave in a coordinated fashion."[257] In an accompanying *FNPRM* pertaining to the Commission's channel occupancy limits, the Commission sought comment on the reliability of certain studies and criticisms thereof, including one study based on data from 1999 finding that "vertically integrated MSOs are more likely than non-vertically integrated MSOs to carry the start-up basic cable

[250] *See* 47 U.S.C. § 533(f)(1)(B).

[251] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, Second Report and Order, 8 FCC Rcd 8565, 8587, ¶ 51 (1993).

[252] *Id.* at 8587-88, ¶ 52.

[253] *Id.* at 8588, ¶ 53.

[254] *See Cable Horizontal and Vertical Ownership Limits*, Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2193, ¶ 137 (2008) ("*Cable Ownership Rules FNPRM*"); *see also infra* ¶ 74.

[255] *See Cable Ownership Rules FNPRM*, 23 FCC Rcd at 2195-96, ¶ 145; *see also 2007 Program Access Order*, 22 FCC Rcd at 17840-41, ¶¶ 71-72.

[256] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 14 FCC Rcd 19098, 19116, ¶ 43 (1999) ("*Third Report and Order*"), *rev'd and remanded in part and aff'd in part, Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001) ("The Commission never explains why the vertical integration of MSOs gives them 'mutual incentive to reach carriage decisions beneficial to each other,' what may be the firms' 'incentives to buy ... from one another,' or what the probabilities are that firms would engage in reciprocal buying (presumably to reduce each other's average programming costs)." (quoting *Third Report and Order*, 14 FCC Rcd at 19116, ¶ 43)).

[257] *See Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order, 23 FCC Rcd 2134, 2165-66, ¶¶ 63-66 (2008), *vacated, Comcast Corp. v. FCC*, 579 F.3d 1 (2009).

networks of other MSOs."[258] We seek comment on how these studies or any other studies, including studies based on more recent data, either support or refute the position that vertically integrated MVPDs tend to favor programming vendors affiliated with other MVPDs over unaffiliated programming vendors. Is there sufficient evidence to warrant allowing programming vendors to make a case-by-case showing through the program carriage complaint process that a vertically integrated MVPD has discriminated on the basis of a programming vendor's lack of affiliation with another MVPD?

75. We also seek comment on whether it is reasonable to interpret Section 616(a)(3) to preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. Section 616(a)(3) requires the Commission to adopt regulations that prevent an MVPD from engaging in conduct that unreasonably restrains the ability of "an unaffiliated video programming vendor" to compete fairly by discriminating on the basis of "affiliation or non-affiliation" of programming vendors.[259] The terms "unaffiliated," "affiliation," and "non-affiliation" are not defined in Section 616. These terms could be interpreted narrowly as in the *1993 Program Carriage Order* to prohibit a vertically integrated MVPD only from discriminating on the basis of "affiliation or non-affiliation" in a manner that favors its own affiliated programming vendor, but would not prevent a vertically integrated MVPD from discriminating on the basis of "affiliation or non-affiliation" in a manner that favors a programming vendor affiliated with another MVPD. Alternatively, these terms might be interpreted more broadly to prevent a vertically integrated MVPD from discriminating on the basis of "affiliation or non-affiliation" in a manner that favors any programming vendor affiliated with any MVPD. We note that one cable operator has previously advanced a broad interpretation of Section 616(a)(3), stating that this provision precludes collusion among cable operators.[260]

76. We seek comment on which interpretation is more consistent with Congressional intent. Is the broad interpretation more consistent with Congress's goal to ensure that cable operators provide the "widest possible diversity of information sources and services to the public"[261] as well as with the program access requirements, which prohibit exclusive contracts and discriminatory conduct between a cable operator and *any* cable-affiliated programmer, not just its own affiliated programmer?[262] Is the narrow interpretation more consistent with certain language in the legislative history of the 1992 Cable Act? For example, language in the House Report states that Section 616 "was crafted to ensure that a multichannel video programming *operator* does not discriminate against an unaffiliated video

[258] *See Cable Ownership Rules FNPRM*, 23 FCC Rcd at 2194, ¶¶ 139-141 (citing Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks: An Empirical Study* ("Kang Study")); *see also id.* at 2194, ¶ 141 (seeking comment on whether "Kang's study show[s] that a more extended form of vertical foreclosure exists, based on 'reciprocal carriage' of integrated programming, in which a coalition of cable operators unfairly favor each others' affiliated programming"). We note that the Kang Study states that it is based on data from 1999. *See* Kang Study at 13.

[259] 47 U.S.C. § 536(a)(3); 47 C.F.R. § 76.1301(c).

[260] In opposing the horizontal cable ownership cap, Comcast Corporation has stated that "there are alternative, better tailored legal remedies that could be relied upon to reduce the risk of collusion, even if such a risk were shown to exist. The Commission's program carriage rules, which explicitly prohibit a cable operator from 'discriminating in video programming distribution *on the basis of affiliation or nonaffiliation*,' already proscribe collusive behavior." *See* Supplemental Comments of Comcast, MM Docket No. 92-264 (February 14, 2007), at 15 (citing 47 U.S.C. § 536(a)(3) and 47 C.F.R. § 76.1301(c)) (emphasis in original).

[261] 47 U.S.C. § 521(4); *see also* 1992 Cable Act, Section 2(a)(5) (expressing concern regarding the inability of unaffiliated programming vendors to secure carriage); *see also 1993 Program Carriage Order*, 9 FCC Rcd at 2643, ¶ 2 (noting Congress's concern in passing the 1992 Cable Act that unaffiliated programming vendors could not obtain carriage on the same favorable terms as vertically integrated programming vendors).

[262] *See* 47 U.S.C. § 548(c)(2)(D).

programming vendor in which *it* does not hold a financial interest."[263] How should we interpret other language in the legislative history of the 1992 Cable Act? For example, one of the stated findings of the 1992 Cable Act is that "cable *operators* have the incentive and ability to favor *their* affiliated programmers. This could make it more difficult for noncable-affiliated programmers to secure carriage on cable systems."[264] This language is unclear as to whether Congress was referring to the incentives of individual cable operators to favor their own affiliated programmers, or whether Congress was referring to the incentives of cable operators as a whole to favor cable-affiliated programmers, both their own affiliates and those affiliated with other cable operators.[265]

77. We also seek comment on the practical implications of an interpretation of Section 616(a)(3) that would preclude a vertically integrated MVPD from discriminating on the basis of a programming vendor's lack of affiliation with another MVPD. For example, how should we amend the requirements for establishing a *prima facie* case of discrimination on the basis of affiliation in the absence of direct evidence?[266] Should we provide that the complaint must contain evidence that the complainant provides video programming that is similarly situated to video programming provided by a programming vendor affiliated with the defendant MVPD *or with another MVPD*?[267] Should we also require the complainant to provide evidence that the defendant MVPD is vertically integrated?[268] We also seek comment on how this interpretation of Section 616(a)(3) will impact the proposed good faith negotiation requirement for vertically integrated MVPDs described above.[269] Should the rule provide that a vertically integrated MVPD must negotiate in good faith with an unaffiliated programming vendor with respect to video programming that is similarly situated to video programming affiliated with the MVPD *or with another MVPD*? We also seek comment on how this interpretation of Section 616(a)(3) will impact discovery. Should we expect that the programming vendor affiliated with the non-defendant MVPD will have relevant information, such as contracts with other MVPDs? For cases decided on the merits by the Media Bureau, should our rules specify procedures for requesting that the Media Bureau issue a subpoena pursuant to Section 409 of the Act to compel a third-party affiliated programming vendor to participate in discovery?[270]

78. In addition to the foregoing, we seek comment on whether to broaden the definition of "affiliated" and "attributable interest" in Section 76.1300 of the Commission's rules to reflect changes in the marketplace. These rules focus on the extent to which a programming vendor and an MVPD have

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[263] H.R. Rep. No. 102-628 (1992), at 110 (emphasis added); *see also* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("For example, the cable *operator* might give *its* affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers.") (emphasis added).

[264] 1992 Cable Act, Section 2(a)(5).

[265] *See* S. Rep. No. 102-92 (1991), at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 ("vertical integration gives cable *operators* the incentive and ability to favor *their* affiliated programming services") (emphasis added); *see id.* at 27, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1160 ("To ensure that cable *operators* do not favor *their* affiliated programmers over others, the legislation bars cable operators from discriminating against unaffiliated programmers.") (emphasis added).

[266] *See Second Report and Order* in MB Docket No. 07-42, *supra* ¶ 14.

[267] *See infra*, Appendix D (47 C.F.R. § 76.1302(d)(3)(iii)(B)(*2*)(*i*)); *see also supra* ¶ 72.

[268] *See id.* (47 C.F.R. § 76.1302(d)(3)(iii)(B)(*2*)(*ii*)).

[269] *See supra* ¶¶ 68-71.

[270] *See* 47 U.S.C. § 409. We note that the hearing rules applicable to ALJs contain procedures for requesting and issuing subpoenas. *See* 47 C.F.R. §§ 1.331-340.

common ownership or management.[271] Are there other kinds of relationships between a programming vendor and an MVPD, other than those involving common ownership or management, that should nonetheless be considered "affiliation" under our rules? For example, to the extent that a programming vendor and an MVPD have entered into a contractual relationship that requires carriage of commonly owned channels and adversely affects the ability of other programming vendors to obtain carriage, should this relationship be considered "affiliation" under the program carriage rules? In addition, we seek comment on the extent to which MVPDs are making investments in programming vendors or sports teams that were not common when the 1992 Cable Act was enacted and that may not be considered "affiliation" under our current rules but that might nonetheless provide the MVPD with an incentive to favor certain programming vendors for other than legitimate business reasons. To the extent this is a concern, how should our rules be amended to address this issue? We also seek comment on the extent to which MVPDs are affiliated with "video programming vendors" that are not necessarily programming networks. Are the protections afforded by Section 616 limited to programming networks?[272] If not, do our current rules need to be amended to address concerns that MVPDs favor affiliated content over non-affiliated content for other than legitimate business reasons? Should our rules be amended to better address discrimination against a video programming vendor that seeks to distribute its own content, such as sports, movie or other programming, in order to favor similar content associated with the MVPD?

I. Burden of Proof in Program Carriage Discrimination Cases

79. After a complainant establishes a *prima facie* case of program carriage discrimination, the case proceeds to a decision on the merits. Only two program carriage cases have been decided on the merits to date. In neither case was the Commission required to decide the issue of which party bears the burdens of production and persuasion after the complainant establishes a *prima facie* case. In *MASN v. Time Warner Cable*, an arbitrator determined that the burdens shift to the defendant after the complainant establishes a *prima facie* case.[273] Conversely, in *WealthTV*, an ALJ ruled that the burdens remain with the

[271] *See* 47 C.F.R. § 76.1300(a) ("Affiliated. For purposes of this subpart, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities."); 47 C.F.R. § 76.1300(b) ("Attributable interest. The term 'attributable interest' shall be defined by reference to the criteria set forth in Notes 1 through 5 to § 76.501 provided, however, that: (1) The limited partner and LLC/LLP/RLLP insulation provisions of Note 2(f) shall not apply; and (2) The provisions of Note 2(a) regarding five (5) percent interests shall include all voting or nonvoting stock or limited partnership equity interests of five (5) percent or more.").

[272] Section 616 defines the term "video programming vendor" broadly as "a person engaged in the production, creation, or wholesale distribution of video programming for sale." 47 U.S.C. § 536(b). The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). The Senate Report accompanying the 1992 Cable Act, however, appears to indicate that the term "video programmer" includes only networks, and not program suppliers. S. Rep. No. 102-92 (1991), at 73, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1206 ("The term 'video programmer' means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale. This term applies to those video programmers which enter into arrangements with cable operators for carriage of a programming service. For example, the term 'video programmer' applies to Home Box Office (HBO) but not to those persons who sell movies and other programming to HBO. It applies to a pay-per-view service but not to the supplier of the programming for this service."). We note, however, that Section 616 of the Act uses the term "video programming vendor" as stated in the House version of what became Section 616, not "video programmer" as stated in the Senate version. *See* 47 U.S.C. § 536(b); *see also* H.R. Rep. No. 102-628 (1992), at 18-19, 110, 143-44.

[273] *See MASN v. Time Warner Cable*, 25 FCC Rcd at 18101-02, ¶ 4 (citing *In the Matter of Arbitration between TCR Sports Broadcasting Holding, L.L.P., d/b/a Mid-Atlantic Sports Network, Claimant, and Time Warner Cable Inc., Respondent*, Case No. 71 472 E 00697 07, Decision and Award (June 2, 2008)).

complainant after the complainant establishes a *prima facie* case.[274] On review of these cases, however, the Commission found no reason to address this issue because the facts demonstrated that the defendant would prevail even assuming that the burdens shifted to the defendant.[275]

80. We propose to codify in our rules which party bears the burdens of production and persuasion in a program carriage discrimination case after the complainant has established a *prima facie* case. We seek comment on two alternative frameworks for assigning these burdens: the program access discrimination framework and the intentional discrimination framework. Under the program access discrimination framework, after a complainant establishes a *prima facie* case of discrimination based on either direct or circumstantial evidence, the burdens of production and persuasion shift to the defendant to establish legitimate and non-discriminatory reasons for its carriage decision.[276] Under the intentional discrimination framework, the shifting of burdens varies depending upon whether the complainant relies on direct or circumstantial evidence to establish a *prima facie* case of discrimination. If a complainant relies on direct evidence to establish a *prima facie* case of discrimination, the burdens of production and persuasion shift to the defendant to establish that the carriage decision would have been the same absent considerations of affiliation.[277] If a complainant relies on circumstantial evidence to establish a *prima facie* case of discrimination, the burden of production (but not the burden of persuasion) shifts to the defendant to produce evidence of legitimate and non-discriminatory reasons for its carriage decision.[278] If

[274] *See WealthTV Recommended Decision*, 24 FCC Rcd at 12995-96, ¶ 58 and 12997, ¶ 61 (reaffirming ruling of the Presiding Judge that the program carriage complainant after establishing a *prima facie* case bears the burden of proceeding with the introduction of evidence and the burden of proof). The ALJ also concluded that the allocation of the burden of proof was immaterial to the decision because "[w]hatever the allocation of burdens, the preponderance of the evidence, viewed in its entirety, demonstrates that the defendants never violated section 616 of the Act or section 76.1301(c) of the rules." *See id.* at 12997, ¶ 62.

[275] *See MASN v. Time Warner Cable*, 25 FCC Rcd at 18105, ¶ 11 ("We need not, and do not, address in this decision the issue of the appropriate legal framework, however, because we find that TWC would prevail under either framework. That is, even assuming that the burdens of production and persuasion shift to TWC to establish legitimate and non-discriminatory reasons for its carriage decision after MASN establishes a *prima facie* case of discrimination, we find that TWC prevails because it has established legitimate reasons for its carriage decision that are borne out by the record and are not based on the programmer's affiliation or non-affiliation."); *WealthTV Commission Order* at ¶ 18 ("[W]e need not decide here whether the ALJ properly allocated the burdens . . . . We conclude that the defendants would have prevailed even if they had been required to carry the burdens of production and proof, as WealthTV contends was proper. Accordingly, we need not consider whether the burdens were properly allocated . . . .").

[276] *See 1993 Program Access Order,* 8 FCC Rcd at 3416, ¶ 125 ("When filing a complaint, the burden is on the complainant MVPD to make a *prima facie* showing that there is a difference between the terms, conditions or rates charged (or offered) to the complainant and its competitor by a satellite broadcast programming vendor or a vertically integrated satellite cable programming vendor that meets our attribution test."); *id.* at 3364, ¶ 15 ("When evaluating a discrimination complaint, we will initially focus on the difference in price paid by (or offered to) the complainant as compared to that paid by (or offered to) a competing distributor. The [defendant] program vendor will then have to justify the difference using the statutory factors set forth in Section 628(c)(2)(B). . . . In all cases, the [defendant] programmer will bear the burden to establish that the price differential is adequately explained by the statutory factors.").

[277] *See, e.g., Laderach v. U-Haul*, 207 F.3d 825, 829 (6th Cir. 2000).

[278] *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 (1993) (to meet its burden of production, the defendant must clearly set forth, through the introduction of admissible evidence, reasons for the action which, if believed by the trier of fact, would support a finding that unlawful discrimination was not the cause of the action in question).